No. SC94564

In the
Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

SANTONIO MCCOY,

Appellant.

Appeal from the City of St. Louis Circuit Court
Twenty Second Judicial Circuit
The Honorable Jimmie M. Edwards, Judge

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

This is an appeal from a St. Louis City Circuit Court judgment convicting Santonio McCoy ("Defendant") of one count of unlawful possession of a firearm, § 571.070, RSMo. Cum. Supp. 2012. (L.F. 12-13). Defendant does not contest the sufficiency of the evidence to support his convictions. Defendant was tried by jury December 11-12, 2013. (L.F. 2-4).

Viewed in the light most favorable to the verdict, the evidence presented at trial showed the following:

On June 23, 2011, Officers Andre Rogers and William Gaddy were patrolling the Walnut Park West neighborhood of St. Louis at around 6:00 a.m., when they heard gunshots. (Tr. 199-200, 257). The officers turned onto Lalite Avenue and heard several more gunshots. (Tr. 201, 258-59). The officers slowed down to look for people, and halfway down Lalite, they saw two African American men standing at the corner of Lalite and Mimika Avenue; one was holding an AK-47 and the other was holding an M-11 automatic handgun. (Tr. 202, 260-61). The man holding the AK-47 turned toward the officers and started to run across a vacant lot with the AK-47 in hand. (Tr. 203, 262). The man holding the M-11 was wearing a green short-sleeved shirt and blue jeans; he followed after the man with the AK-47, but slipped and fell as he ran up an embankment. (Tr. 204-05, 263). The man

with the M-11, later identified as Defendant, stood up and threw the M-11 in the air and onto the ground. (Tr. 205, 263-64). Defendant looked at the officers and said, "Hey, they went that way, they were just shooting out here." (Tr. 206, 264). The officers arrested Defendant. (Tr. 206, 265).

The State charged Defendant via substitute information in lieu of indictment, as a prior and persistent offender, with one count of unlawful possession of a firearm. (L.F. 12-13). The information listed Defendant's prior felony convictions as follows: On April 5, 2006, Defendant pled guilty to one count of unlawful use of a weapon and one count of resisting or interfering with an arrest for a felony; on September 13, 1994, Defendant pled guilty to first-degree tampering; in another case on September 13, 1994, Defendant pled guilty to first-degree tampering; on May 3, 1994, Defendant was found guilty of the felony of stealing; on May 17, 1994, Defendant was found guilty of one count of second-degree burglary and one count of felony stealing; and on June 15, 1994, Defendant was found guilty of felony stealing. (L.F. 13). At trial, the parties stipulated that Defendant was convicted of a previous felony in the Circuit Court for the City of St. Louis, and the State offered into evidence Exhibits 25 through 29 to prove Defendant's prior convictions for purposes of the court's determination that Defendant was a prior and persistent offender. (Tr. 193, 394-96).

Prior to the presentation of evidence, the trial court held a hearing on Defendant's pre-trial motions. (Tr. 6-7). Defendant moved to dismiss the charge against him based on the unconstitutionality of section 571.070. (Tr. 6-7). Defendant argued the statute violated article I, section 23 of the Missouri Constitution in that it was unconstitutionally retrospective, or in the alternative, that section 571.070 was an improper time, place, and manner restriction. (Supp. L.F. 1). The trial court denied Defendant's motion to dismiss. (Tr. 7).

The jury found Defendant guilty as charged, and the court sentenced Defendant as a prior and persistent offender to seven years' imprisonment. (Tr. 417, 428).

ARGUMENT

I. The trial court did not err in overruling Defendant's motion to dismiss the felon-in-possession-of-a-firearm charge against him because the recent amendment to article I, section 23 of the Missouri Constitution does not apply to the present case as it was not in effect at the time Defendant committed the charged crime.

A. Standard of review.

Constitutional challenges to a statute are reviewed *de novo*. *Franklin County ex rel. Parks v. Franklin County Comm'n*, 269 S.W.3d 26, 29 (Mo. 2008). "A statute is presumed to be constitutional and will not be invalidated unless it clearly and undoubtedly violates some constitutional provision and palpably affronts fundamental law embodied in the constitution." *Board of Education of City of St. Louis v. Missouri State Board of Education*, 271 S.W.3d 1, 7 (Mo. 2008) (internal quotation marks and citation omitted).

B. Recent amendments to article I, section 23 of the Missouri Constitution.

On May 7, 2014, the General Assembly passed the Senate Committee Substitute for Senate Joint Resolution 36. *Dotson v. Kander*, 435 S.W.3d 643, 644 (Mo. 2014). Senate Joint Resolution 36, otherwise known as amendment 5, sought to amend article I, section 23, of the Missouri Constitution. The

following is the text of the amendment, with the alterations from the previous constitutional provision in bold:

> Section 23. That the right of every citizen to keep and bear arms, **ammunition, and accessories typical to the normal function of such arms,** in defense of his home, person**, family** and property, or when lawfully summoned in aid of the civil power, shall not be questioned [; but this shall not justify the wearing of concealed weapons]. **The rights guaranteed by this section shall be unalienable. Any restriction on these rights shall be subject to strict scrutiny and the state of Missouri shall be obligated to uphold these rights and shall under no circumstances decline to protect against their infringement. Nothing in this section shall be construed to prevent the general assembly from enacting general laws which limit the rights of convicted violent felons or those adjudicated by a court to be a danger to self or others as a result of a mental disorder or mental infirmity.**

MO. CONST. art. I, § 23 (amended 2014).

The governor called for a special election, and the election was held on August 5, 2014. *Dotson*, 435 S.W.3d at 644. The resolution passed by a margin of 60.946% to 39.054%. Election Results, Secretary of State's Website, http://enrarchives.sos.mo.gov/enrnet/default.aspx?eid=750002907 (last visited January 5, 2015). The amendment took effect on September 4, 2014, while the appeal in the present case was still pending. MO. CONST. art. XII, § 2(b) (1945).

C. The recent amendment to article I, section 23 of the Missouri Constitution does not apply to the present case.

Defendant notes in his brief that the State urged this Court to apply the recent amendment to cases pending on appeal in another case pending before this Court, namely, *State v. Merritt*, SC94096. (App. Br. 21). But the State proposed this argument in the alternative to its argument that the amendment should *not* apply to cases pending on appeal at the time of the amendment. Here, the State similarly argues that the amendment should not apply to cases pending on direct review at the time of the enactment of the amendment, or, in the alternative, in part E, infra, the State argues that if this Court should find that the amendment applies to the present case, that section 571.070 is constitutional in that it is narrowly tailored to effectuate a compelling governmental interest.

1. The constitutionality of section 571.070 should be evaluated under the Missouri Constitution as it existed at the time of the criminal conduct.

The constitutionality of section 571.070 should be evaluated under the Missouri Constitution in existence at the time of the conduct underlying the charged crime. The general rule is that culpability for criminal conduct is assessed according to the law in effect at the time of the conduct giving rise to the charged crime. *See State v. Edwards*, 983 S.W.2d 520, 521 (Mo. 1999) ("Section 1.160 governs. It requires that a defendant be tried for the offense as defined by the law that existed at the time of the offense . . . ."). This Court has held that constitutional amendments are deemed prospective only, unless a contrary intention is clearly expressed in the amendment. *State ex rel. Hall v. Vaughn*, 483 S.W.2d 396, 398 (Mo. banc 1972) ("The settled rule of construction in this state, applicable alike to the Constitutional and statutory provisions, is that, unless a different intent is evident beyond reasonable question, [amendments] are to be construed as having a prospective operation only . . . .") (internal citations and quotation marks omitted). In order for this Court to find retroactive effect, it must be "evident beyond reasonable question" that the intent was to apply the amendment retroactively. *Id.*

There is no indication in the amendment that it was intended to apply retroactively, i.e., to affect persons charged with crimes allegedly committed prior to the effective date of the amendment. The constitutionality of section 571.070 in relation to the conduct that occurred in this case should be assessed, therefore, under the previous version of article I, section 23, not under the newly amended constitutional provision.

Defendant relies on *Griffith v. Kentucky*, 479 U.S. 314 (1987), to support his argument that the newly amended constitutional provision should apply to this case, stating that, "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final."[1] (App. Br. 21, internal citation and quotation marks omitted). The Court in *Griffith* held that new constitutional rules *announced in Supreme Court decisions* interpreting the United States

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[1] Defendant again states that the State relied on *Griffith* in "urg[ing] this Court to apply the new amendment to this issue," in *State v. Merritt*, SC94096. (App. Br. 21). Again, in *Merritt*, the State offered this argument, as it does in the present appeal, in the alternative to the argument that the amendment should not apply to cases pending on appeal at the time of the enactment of the constitutional amendment.

Constitution should be given retroactive effect to all cases pending on direct appeal at the time the new rule is announced. *Griffith*, 479 U.S. at 320-22. The Court's retroactivity analysis in *Griffith* applied only to constitutional rules announced in Court decisions; it did not affect the retroactivity analysis given to new constitutional amendments that were not in effect at the time the criminal conduct was committed. As *Hall* involved the application of a new constitutional amendment, and not a rule derived from an interpretation of the already-existing constitution, *Griffith* had no effect on the holding of *Hall*.

Further, the *Griffith* decision is consistent with the general proposition that the criminality of conduct is assessed under the law as it existed at the time of the conduct. There, the Supreme Court simply interpreted the already-existing constitution, and as it was the same constitution that was in existence at the time of other cases pending on direct review, the newly interpreted rule from the already-existing constitution applied to those cases. In *Hall* and here, conversely, the new rule of criminal procedure came not from an interpretation of the Missouri Constitution as it existed at the time of the criminal conduct in question, but from an amendment to the Missouri

Constitution that added entirely new provisions.[2] As the new rule was announced through a constitutional change, and not through an interpretation of the constitution in effect at the time of the criminal conduct, the new rule should not apply to the present case.

2. Section 571.070 was a proper exercise of the State's police power under the Missouri Constitution as it existed at the time of the criminal conduct.

Section 571.070 is not unconstitutional under the previous version of the constitution in that it is a valid exercise of the State's police power. Article I, section 23 of the Missouri Constitution in effect when Defendant possessed the firearm stated, in relevant part: "That the right of every citizen to keep and bear arms in defense of his home, person and property . . . shall

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[2] Defendant also cites Missouri cases applying the new rule set forth in *Miller v. Alabama*, as evidence that the new constitutional amendment should apply to the present case. (App. Br. 21). But *Miller*, like *Griffith*, involved the retroactive application of an interpretation of the constitution as it existed at the time of the criminal conduct, not the application of an entirely new constitutional provision that was not in effect at the time of the criminal conduct.

not be questioned; but this shall not justify the wearing of concealed weapons." MO. CONST. art. I, § 23 (1945). It has long been held, however, that some firearms regulations are constitutionally permissible.

The State has the inherent power to regulate the carrying of firearms as a proper exercise of the State's police power. *State v. Richard*, 298 S.W.3d 529, 531-33 (Mo. 2009); *State v. Horne*, 622 S.W.2d 956, 957 (Mo. 1981). Article I, section 23 has "never been held to deprive the General Assembly of authority to enact laws which regulate the time, place and manner of bearing firearms." *City of Cape Girardeau v. Joyce*, 884 S.W.2d 33, 34 (Mo. App. E.D. 1994). The right to keep and bear arms, as set forth in article I, section 23 does not trump the State's police power. *Heidbrink v. Swope*, 170 S.W.3d 13, 16 (Mo. App. E.D. 2005). Rather, "it is the function of the courts to determine whether a statute purporting to constitute an exercise of the police power has a real and substantial relationship to the protection of the public health, safety, morals, or welfare and whether it unjustifiably invades rights secured by the Constitution." *Id.* "The legislature is afforded wide discretion to exercise its police power." *Richard*, 298 S.W.3d at 532.

The United States Supreme Court in the analogous second amendment context recently acknowledged the "longstanding prohibitions on the possession of firearms by felons," noting that these prohibitions are

"presumptively lawful." *District of Columbia v. Heller*, 554 U.S. 570, 626-27, n. 26 (2008). Given the fact that felons have already shown a willingness to violate the law, keeping firearms out of their hands bears a substantial relationship to the government's function in protecting public safety. *See Lewis v. United States*, 445 U.S. 55, 66 (1980) (stating that in considering a statute banning felons from possessing firearms, "Congress focused on the nexus between violent crime and the possession of a firearm by any person with a criminal record. Congress could rationally conclude that any felony conviction, even an allegedly invalid one, is a sufficient basis on which to prohibit the possession of a firearm."); *United States v. Barton*, 633 F.3d 168, 175 (3d Cir. 2011) ("It is well-established that felons are more likely to commit violent crimes than are other law-abiding citizens."); *United States v. Rozier*, 598 F.3d 768, 771 (11th Cir. 2010) ("While felons do not forfeit their constitutional rights upon being convicted, their status as felons substantially affects the level of protection those rights are accorded."); *State v. Brown*, 571 A.2d 816, 821 (Me. 1990) ("One who has committed any felony has displayed a degree of lawlessness that makes it entirely reasonable for the legislature, concerned for the safety of the public it represents, to want to keep firearms out of the hands of such a person."); *People v. Blue*, 544 P.2d 385, 391 (Co. 1975) ("To limit the possession of firearms by those who, by

their past conduct, have demonstrated an unfitness to be entrusted with such dangerous instrumentalities, is clearly in the interest of the public health, safety, and welfare and within the scope of the Legislature's police power.").

In fact, the threat to public safety exists not only from those who have committed violent or dangerous felonies, but also from those who have committed even non-violent misdemeanors. A 1998 study published in the Journal of the American Medical Association concluded that "even handgun purchasers with only 1 prior misdemeanor conviction and no convictions for offenses involving firearms or violence were nearly 5 times as likely as those with no prior criminal history to be charged with new offenses involving firearms or violence." Garen Wintemute, et al., *Prior Misdemeanor Convictions as a Risk Factor for Later Violent and Firearm-Related Criminal Activity Among Authorized Purchasers of Handguns*, 280 JAMA 2083, 2083 (1998). At the end of the study period, 50.4% of gun purchasers with at least one prior misdemeanor conviction were charged with a new offense, as compared to the 9.8% who had no previous criminal convictions. *Id.* at 2085. "Handgun purchasers with at least 1 prior misdemeanor conviction were more than 7 times as likely as purchasers with no prior criminal history to be charged with a new offense[.]" *Id.* Additionally, "[s]ubjects with only 1 prior conviction, and none involving either firearms or violence, were at increased

risk for . . . violent offenses [4.8 times as likely as those with no prior convictions], and Violent Crime Index offenses[3] [5.0 times as likely as those with no prior convictions]." *Id.*

Like the unlawful use of a weapon statute at issue in *Richard*, section 571.070 is a valid exercise of the State's police power. As discussed above, allowing felons to possess firearms "poses a demonstrated threat to public safety." *Richard*, 298 S.W.3d at 532. Based on the wide discretion given to the legislature to utilize its police power, section 571.070 "represents a reasonable exercise of the legislative prerogative to preserve public safety by regulating the possession of firearms" by felons. *Id.*

Several other jurisdictions have held that similar laws banning the possession of firearms by a felon, regardless of the nature of the underlying felony, pass constitutional muster. *See United States v. Pruess*, 703 F.3d 242, 247 (4th Cir. 2012) ("We now join our sister circuits in holding that

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[3] Violent Crime Index offenses include murder, non-negligent manslaughter, forcible rape, robbery, and aggravated assault. Garen Wintemute, et al., *Prior Misdemeanor Convictions as a Risk Factor for Later Violent and Firearm-Related Criminal Activity Among Authorized Purchasers of Handguns*, 280 JAMA 2083, 2083 (1998)

application of the felon-in-possession prohibition to allegedly non-violent felons like Pruess does not violate the Second Amendment."); *United States v. Scroggins,* 599 F.3d 433, 451 (5th Cir. 2010) ("Prior to *Heller,* this circuit had already recognized an individual right to bear arms, and had determined that criminal prohibitions on felons (violent or nonviolent) possessing firearms did not violate that right."); *Brown*, 571 A.2d at 821 (finding that Maine's statute barring all felons from possessing firearms did not violate Maine's constitution because "[o]ne who has committed any felony has displayed a degree of lawlessness that makes it entirely reasonable for the legislature, concerned for the safety of the public it represents, to want to keep firearms out of the hands of such a person.").

The Missouri legislature's apparent conclusion that felons have a limited right to bear arms is not novel. Several courts have held that felons do not fall under the protection of the Second Amendment to the United States Constitution at all. *See United States v. Marzzarella*, 614 F.3d 85, 92 (3d Cir. 2010) ("[A]lthough the Second Amendment protects the individual right to possess firearms for defense of hearth and home, *Heller* suggests, and many of our sister circuits have held, a felony conviction disqualifies an individual from asserting that interest. . . . This is so, even if a felon arguably possesses just as strong an interest in defending himself and his home as any

law-abiding individual."); *Rozier*, 598 F.3d at 771 (finding that felons are a class of persons disqualified from the protection of the Second Amendment and rejecting the defendant's argument that a statute violated the Second Amendment because he—a felon—possessed a firearm for the purpose of self-defense); *United States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010) (finding that felons are disqualified from the protections of the Second Amendment, stating, "Thus, felons are categorically different from the individuals who have a fundamental right to bear arms.").

In sum, section 571.070 operates to keep firearms out of the hands of felons who have previously demonstrated a disregard for, or refusal to follow, the laws of this State. As such, the statute is a reasonable exercise of the legislature's prerogative to preserve the public safety. The statute thus bears a substantial relationship to the State's effort to protect the public safety and does not violate Article I, section 23 of the Missouri Constitution. The trial court did not err in denying Defendant's motion to dismiss.

II. Alternatively, the statute is constitutional under the new amendment as it is narrowly tailored to advance a compelling government interest.

While the Missouri Constitution does not define the phrase "strict scrutiny," for the sake of this argument Respondent will assume the phrase appearing in the constitution has the same definition as the term of art developed in case law.

The trial court did not err in denying Defendant's motion to dismiss under the newly amended article I, section 23 because section 571.070 survives strict scrutiny review. "To pass strict scrutiny review, a governmental intrusion must be justified by a 'compelling state interest' and must be narrowly drawn to [accomplish] the compelling state interest at stake." *Bernat v. State*, 194 S.W.3d 863, 868 (Mo. 2006) (internal citation and quotation marks omitted). Although strict scrutiny is the highest standard of review, its application is not automatically fatal to the statute at issue. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'"). Here, section 571.070 passes this stringent test.

A. The State has a compelling interest.

As to the first prong of strict scrutiny review, the State has a compelling interest that is served by prohibiting all felons from possessing firearms. This compelling interest is to protect the public safety and reduce the incidence of violent and firearm-related criminal activity. *See In re Care and Treatment of Norton*, 123 S.W.3d 170, 174 (Mo. 2003) (as modified Jan. 27, 2004) ("The State has a compelling interest in protecting the public from crime."). This is certainly a compelling interest in light of the increase in violent crime in the state. *See Lewis v. United States*, 445 U.S. 55, 66 (1980) (noting "the receipt and possession of a firearm by a felon constitutes a threat, among other things, to the continued and effective operation of the Government of the United States"). Courts have noted that keeping felons from accessing firearms is an effective and important means of protecting public safety in light of the fact that felons, by violating the law, have shown a disregard for the rights and safety of others. *See United States v. Barton*, 633 F.3d 168, 175 (3rd Cir. 2011) ("It is well-established that felons are more likely to commit violent crimes than are other law-abiding citizens."); *United States v. Yancey*, 621 F.3d 681, 685 (7th Cir. 2010) (noting that "someone with a felony conviction on his record is more likely than a nonfelon to engage in illegal and violent gun use.").

That the statute serves the State's compelling interest is supported by studies that have shown that previous convictions—including convictions for non-violent, property crimes—are correlated with future violent crime. For example, "[a] review of New York's first 1,000 hits [in its DNA database] showed that the vast majority were linked to crimes like homicide and rape, but of these, 82 percent of the offenders were already in the databank as a result of a prior conviction for a 'lesser' crime such as burglary or drugs." Zedlewski & Murphy, *DNA Analysis for "Minor" Crimes: A Major Benefit for Law Enforcement,* Nat'l Inst. Just. J. No. 253, at 4 (Jan. 2006). A study conducted in Florida similarly revealed that "52 percent of database hits against murder and sexual assault cases matched individuals who had prior convictions for burglary." *Id.* These statistics show that criminals often engage in escalating acts of criminality.

In light of these studies revealing the fact that those who have committed serious offenses in the past are more likely to reoffend, and to do so violently, it is of paramount importance to prevent previous felony offenders from possessing firearms. This is important both to stop prior offenders from committing new offenses and to limit the harm they are capable of inflicting. Indeed, there is a "reduction in risk for later criminal activity of approximately 20% to 30%" from the denial of handgun purchases

to convicted felons. *See* Wright et al., *Effectiveness of Denial of Handgun Purchase to Persons Believed to Be at High Risk for Firearm Violence,* 89 Am. J. Pub. Health 88, 89 (1999).

At a bare minimum, the State has a compelling interest in minimizing felons' use of firearms in any future crimes. "Domestic assaults with firearms are approximately twelve times more likely to end in the victim's death than are assaults by knives or fists." *See* Brief for the Brady Center to Prevent Gun Violence and the Major Cities Chiefs Association as Amici Curiae in Support of the State of Louisiana at 11-12 *State v. Draughter*, 130 So.3d 855 (2013) (No. 2013-KA-0914), 2013 WL 5404908 (citing *United States v. Skoien,* 614 F.3d 638, 643 (7th Cir. 2010)). Additionally, approximately two-thirds of all reported homicides in 2011 were committed with firearms. *See* Federal Bureau of Investigation, *Violent Crime, Crime in the United States, 2011,* at 1 (Sept. 2012), http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.2011/violent-crime/violentcrimemain_final.pdf.

Furthermore, the Federal Bureau of Investigation's crime data shows that there were 27,155 violent crimes committed in Missouri in 2012.[4] This

[4] The FBI defines "violent crimes" for this data set as "murder/non-negligent manslaughter, forcible rape, robbery, and aggravated assault." Crime in the

demonstrates an increase in the number of violent crimes since 2011; in 2011, Missouri experienced 26,889 violent crimes.[5] This increase in violent crimes, and the high number of violent crimes committed in the state each year, demonstrates the compelling governmental interest in reducing the number of violent crimes and protecting public safety.

B. Section 571.070 is narrowly tailored to protect the State's compelling interest.

The felon-in-possession statute, section 571.070, is narrowly tailored to protect the State's compelling interest. As stated above, the State has a compelling interest in promoting public safety, and those who have committed a felony—and have thereby shown a disregard for the laws of this state—pose a real threat to the public safety. This threat exists not only for

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United States, by State 2012, *available at* http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/5tabledatadecpdf/table_5_crime_in_the_united_states_by_state_2012.xls (last visited Oct. 9, 2014).

[5] Crime in the United States, by State 2011, *available at* http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table-5 (last visited Oct. 9, 2014).

those who have committed violent or dangerous felonies, but also for those who have committed even non-violent offenses. A 1998 study published in the Journal of the American Medical Association concluded that "even handgun purchasers with only 1 prior misdemeanor conviction and no convictions for offenses involving firearms or violence were nearly 5 times as likely as those with no prior criminal history to be charged with new offenses involving firearms or violence." Garen Wintemute, et al., *Prior Misdemeanor Convictions as a Risk Factor for Later Violent and Firearm-Related Criminal Activity Among Authorized Purchasers of Handguns*, 280 JAMA 2083, 2083 (1998). At the end of the study period, 50.4% of gun purchasers with at least one prior misdemeanor conviction were charged with a new offense, as compared to the 9.8% who had no previous criminal convictions. *Id.* at 2085. "Handgun purchasers with at least 1 prior misdemeanor conviction were more than 7 times as likely as purchasers with no prior criminal history to be charged with a new offense[.]" *Id.* Additionally, "[s]ubjects with only 1 prior conviction, and none involving either firearms or violence, were at increased risk for . . . violent offenses [4.8 times as likely as those with no prior convictions], and Violent Crime Index offenses [5.0 times as likely as those with no prior convictions]." *Id.*

Despite Defendant's argument that the distinction between felonies and misdemeanors is arbitrary, rendering the tailoring of the statute insufficiently narrow (App. Br. 23-24), the fact that section 571.070 applies only to felons is itself evidence of the legislature's tailoring of the statute. Given that even those with prior misdemeanor convictions are at an increased risk to commit future crimes involving firearms and violence, the legislature could reasonably prevent at least some misdemeanants from possessing handguns. *See, e.g., United States v. Chovan*, 735 F.3d 1127, 1139-41 (9th Cir. 2013) (upholding federal statute criminalizing possession of firearms by domestic violence misdemeanants). That the Missouri legislature has chosen to tailor the law and bar only felons from possessing weapons shows a more narrowly tailored approach. The increased risk in committing future offenses by all felons necessitates a prohibition of all felons from possessing firearms to effectively achieve the State's interest in protecting public safety and reducing the number firearm-related and violent crimes. To have a statute prohibiting only "violent" or "dangerous" felons from possessing firearms would be under-inclusive in light of study results indicating the increased risk in re-offense by those with even non-violent, misdemeanor convictions.

Although the federal felon-in-possession statute is not identical to section 571.070, it is similar in that it permanently bans all felons from possessing weapons. 18 U.S.C. § 922(g)(1) (2006). While the Supreme Court in *Heller* declined to determine whether intermediate scrutiny or strict scrutiny applied to cases alleging an infringement on the right to bear arms as set forth in the second amendment, at least one federal court has evaluated another portion of the statute, albeit in dicta, under strict scrutiny.[6] *United States v. Marzzarella*, 614 F.3d 85 (3rd Cir. 2010); *see also*

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[6] Respondent was unable to locate any post-*Heller* cases that invoked strict scrutiny review to evaluate the felon-in-possession section of the statute. The federal courts seem to universally agree that, under second amendment analysis in light of *Heller*, the federal felon-in-possession statute is constitutional, and courts either apply intermediate scrutiny or fail to declare what level of scrutiny they apply in upholding the statute. *See, e.g., United States v. Vongxay*, 594 F.3d 1111, 1115-16 (9th Cir. 2010) (holding §922(g)(1) is constitutional without declaring the level of scrutiny applied); *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009) (rejecting the argument that §922(g)(1) is unconstitutional in light of *Heller* without identifying a standard of review); *United States v. Miller*, 604 F.Supp.2d

United States v. Everist, 368 F.3d 517, 519 (5th Cir. 2004) (upholding §922(g)(1), stating that the statute was a "narrowly tailored exception to the freedom to possess firearms" because "[i]rrespective of whether his offense was violent in nature, a felon has shown manifest disregard for the rights of others. He may not justly complain of the limitation on his liberty when his possession of firearms would otherwise threaten the security of his fellow citizens.").

In *Marzzarella*, the Third Circuit determined the constitutionality of §922(k), which prohibited possession of firearms whose manufacturers' serial numbers had been obliterated, altered, or removed. *Id.* at 89. Although the Court applied intermediate scrutiny in upholding the constitutionality of the statute, it went further to note that the statute would survive even strict scrutiny analysis. *Id.* at 99. The Court stated that "serial number tracing serves a governmental interest in enabling law enforcement to gather vital information from recovered firearms," and deemed this a compelling governmental interest. *Id.* The Court went on to find that because the statute "restricts possession only of weapons which have been made less susceptible

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1162, 1164-68 (D.Tn. 2009) (finding §922(g)(1) constitutional under intermediate scrutiny).

to tracing," and it "does not limit the possession of any otherwise lawful firearm," it is narrowly tailored. *Id.*at 100. The Court concluded, "The statute protects the compelling interest of tracing firearms by discouraging the possession and use of firearms that are harder or impossible to trace. It does this by criminalizing the possession of firearms which have been altered to make them harder or impossible to trace." *Id.* at 101.

Here, as in *Marzzarella*, section 571.070.1 is narrowly tailored to effectuate the compelling State interest advanced. As discussed above, the State has a compelling interest in reducing the number of violent and firearm-related crimes in the State. The statute at issue protects this compelling interest by criminalizing the possession of firearms by felons, who are statistically more likely than people with no previous criminal convictions to commit future crimes involving firearms and violence. By prohibiting felons from possessing firearms, the statute in turn seeks to reduce the number of violent or firearm-related crimes. This statute is narrowly tailored to achieve a compelling State interest, and, as such, the statute passes strict scrutiny review and is constitutional.

Defendant argues that because Missouri's statute "provides for no exceptions, has no procedural safeguards, no judicial review, and has no other provisions whereby one could regain his right to possess a firearm," the

statute is not narrowly tailored. (App. Br. 25-27). Defendant cites the federal statute's exceptions for those convicted of certain business-related crimes to demonstrate that Missouri's statute is not narrowly tailored. (App. Br. 25). Defendant also points to the pre-2008 version of the felon-in-possession statute as evidence that the statute could be more narrowly written. (App. Br. 28-29). But just because section 571.070 could be written to exclude more classes of offenders does not mean that, as it is written, it is not sufficiently narrowly tailored to pass strict scrutiny review. Theoretically, the statute could be so narrowly drawn that it only applied to a single type of offender (e.g., convicted murderers), but such narrow tailoring would largely defeat the statute's ability to serve its compelling governmental interest. In fact, the previous version of the statute was, and the federal statute is, more narrowly drawn than necessary in that they exclude some defendants who are likely to commit future violent crimes involving firearms. As it stands, Missouri's statute is narrowly drawn to serve the State's compelling interest, but not so narrowly drawn that it fails to effectively serve that compelling interest.

Defendant additionally argues that "outside of a governor's pardon," Missouri's statute "has no procedures to test whether the person banned actually presents a danger, provides for no judicial review, and gives no real opportunity . . . for one to ever regain his or her right to possess a firearm."

(App. Br. 25). But Missouri's statute does not need to have some form of restoration clause to remain constitutional. Even if having an avenue to restore the right to felons were necessary to save the statute, Missouri law provides at least two such avenues of restoration. The first, as acknowledged by Defendant, is the receipt of a gubernatorial pardon. MO. CONST. art. IV, § 7 (1945); § 217.800, RSMo. Cum. Supp. 2012; *see also Guastello v. Department of Liquor Control*, 536 S.W.2d 21, 24 (Mo. 1976) (finding that a full gubernatorial pardon obliterated a conviction such that if a disqualification from obtaining a liquor license was based upon the prior conviction alone, the disqualification was removed by the pardon).

The second, although limited, possibility for restoration of a felon's ability to possess a firearm is through an expungement. § 610.140, RSMo. Cum. Supp. 2012. Although expungement is only currently available for certain felonies—passing a bad check, fraudulently stopping payment of an instrument, or fraudulent use of a credit device—this remedy would also restore a felon's ability to possess a firearm. *Id.*

Defendant cites to *In re Norton*, for the proposition that a statute will not pass strict scrutiny review unless it contains procedural safeguards. (App. Br. 25-26). *In re Norton* involved the Court's evaluation of the statute providing for the civil commitment of sexually violent predators. *In re Norton*,

123 S.W.3d at 173. The Court determined that the statute did not violate the Equal Protection Clause in part because the civil confinement statutes provided "additional procedural safeguards" to protect an offender's due process rights. *Id.* at 175. But there is an important distinction between *In re Norton* and the present case that Defendant ignores: *In re Norton* involved a civil proceeding whereas the present case is a criminal proceeding. The importance of this distinction is that in criminal trials, the Constitution itself provides the necessary procedural safeguards. In other words, while it was necessary to include procedural safeguards in the civil commitment statutes because the Constitution could not protect the offender's due process rights in a civil matter, no such safeguards are necessary for the felon-in-possession statute to pass strict scrutiny review because these safeguards are already present in criminal trials. As procedural safeguards are inherent in criminal trials through the Constitution, section 571.070 did not need additional safeguards to pass strict scrutiny review.

In sum, the State has a compelling interest in protecting the public safety, and more specifically in reducing the number of violent and firearm-related crimes. Section 571.070.1 is narrowly tailored to effectuate these compelling State interests in that it is limited to precluding *felons* from possessing firearms, and studies have demonstrated that felons are at a

heightened risk for committing future crimes, particularly crimes of violence and firearm-related crimes. As the State has identified a compelling interest for the statute, and demonstrated that the statute is narrowly tailored to achieve that interest, section 571.070 passes strict scrutiny review, and the statute is constitutional under article I, section 23, of the Missouri Constitution.

C. Even if section 571.070 can prohibit only violent felons from possessing firearms, Defendant is not entitled to relief.

In an alternative argument, Defendant seeks to foreclose the possibility that section 571.070 could be constitutional as applied to him. (App. Br. 29-30). In so arguing, Defendant implicitly acknowledges that the new constitutional amendment seems to exempt laws that prohibit violent felons from possessing firearms. Defendant argues that even if the statute applies constitutionally to violent felons, the statute is not constitutional as applied to him because he is not a violent felon. (App. Br. 29-30). In arguing that he is not a "violent felon," Defendant sets forth his previous convictions: "two separate tampering offenses under § 569.080, RSMo, two stealing offenses under § 570.030, RSMo, burglary in the second degree under § 569.170, RSMo, and an additional stealing offense under § 570.030, RSMo." (App. Br. 29). Defendant then argues that because none of these offenses was included

under the definition of "dangerous felony" as defined in § 556.061(8), none of these offenses could be a "violent felony" as the definition of a "dangerous felony" is more restrictive than a "violent felony." (App. Br. 29-30).

But Defendant's argument is logically flawed. If the class of violent felonies is larger than the class of dangerous felonies, then, contrary to Defendant's argument, there would be some violent felonies that are not included in the defined term "dangerous felony." As an example, the list of "dangerous felonies" includes only three assault felonies (first-degree assault, first-degree domestic assault, and first-degree assault of a law enforcement officer), but the Missouri Criminal Code contains no fewer than ten assault offenses, each of which could be considered "violent." § 566.061 (8); *see also* §§ 565.050, 565.060, 565.070, 565.072, 565.073, 565.074, 565.075, 565.081, 565.082, 565.083. Incidentally, first-degree murder—a violent felony by any definition of the phrase—is not listed as a dangerous felony under section 556.061. As there are numerous violent felonies not included on the list of "dangerous felon[ies]," the statutory definition of the term "dangerous felony" should not be used to determine whether a particular felony qualifies as a "violent felony" under the newly amended constitution.

Further, Defendant's recitation of his prior convictions omits two important convictions: his 2006 convictions for unlawful use of a weapon and

resisting arrest.[7] (App. Br. 30; Tr. 395). It is possible that either of these felonies would qualify as a "violent felony" based on the way the crimes were charged. For instance, a conviction for unlawful use of a weapon for shooting a firearm into or out of a motor vehicle would qualify as a violent felony. As it is unclear on the record whether these two convictions would qualify as violent felonies, a remand to the trial court for further determination of the nature of the convictions would be appropriate if the Court were to find that the Constitution as amended applies in this case and that the statute cannot pass strict scrutiny and can only be applied to convicted violent felons.

[7] Defendant's prior convictions for unlawful use of a weapon and resisting arrest were not submitted to the trial court as separate exhibits because, unlike Defendant's convictions that were submitted as separate exhibits, these cases originated in the circuit court and not in a different circuit court.

CONCLUSION

The trial court did not commit reversible error. Defendant's conviction and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06, and contains 7,497 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2007 software; and

2. That a copy of this brief was sent through the e-filing system on this 16th day of January, 2015, to:

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